2006

M&S Cox Investments, LC. Mervyn Cox and Sue Cox v. Provo City Corporation : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

M&S COX INVESTMENTS, LC, a Utah Limited Liability Company, MERVYN COX and SUE COX,

Plaintiffs/Appellants,

vs.

PROVO CITY CORPORATION,

Defendant/Appellee.

Case No. 20060386
Case No. 000403654
Case No. 040402050

Argument Priority Classification No. ____

REPLY BRIEF OF APPELLANTS

APPEAL FROM A FINAL JUDGMENT
OF THE FOURTH DISTRICT COURT OF UTAH COUNTY, UTAH
THE HONORABLE STEVEN L. HANSEN

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Intervenors

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to review this appeal from the judgment of the Fourth Judicial District Court of Utah County, State of Utah, dated April 4, 2006, pursuant to Utah Code Ann. § 78-2a-2-(2)(j).

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

Appellants take issue with the statement at p. 1, that it was the City's "understanding" that "the as-applied challenge . . . has been distilled with the issue of whether the City's amortization determination was arbitrary, capricious or alleged," and the further statement at p. 9 that "the City and the trial court reasonably believed that all issues . . . had been distilled into the amortization question." This understanding is without any support in the record and has certainly never been appellants' understanding. The clear and only record on the as-applied issue is set out and discussed at length at pp. 26-30 of appellants' brief. It was also dealt with at length and argued before the lower court in Plaintiffs' Objection to Defendant's (Proposed) Summary Judgment and Order of Dismissal (R1149-53), in Defendant Provo City's Response (R1155-61) and in Plaintiffs' Reply (R1172-94).

Appellants' as-applied challenge has never been tied to the amortization issues. The as-applied issue is broader than the amortization issue. The appellants' claim that the amendment to Provo City's S-Overlay provisions is unenforceable as applied to property on the 9th East commercial corridor. Applying the amortization ordinance to the appellants' property does nothing to protect the relevant character of the neighborhood located to the east. Appellants' claims on this issue have never been heard.

RESPONSE TO APPELLEE'S STATEMENT OF FACTS

1. The City's repeated references to "legislative intent" at page 9, as well as the statement at p. 9 that "a nonconforming use cannot be indefinite," and similar statements repeated at pp. 15, 16, 17, 19 and 20, for example, do not reference the ordinance or the record and neither provides any such reference. Rather, it is clear in the record, but not mentioned by the City, that until the Motion to Intervene was filed, the City was prepared to accept an indefinite amortization period for the M&S property. (R 920-22; 1212 at pp. 39-40.) The City had approved M&S's permit for the improvements so was fully aware of M&S's recent large investment in, and its use of, the property before the

ordinance was enacted. Yet it made no provision in its amortization ordinance, as it could have done, to express either the "intent" now claimed by the City or to preclude an indefinite extension. In fact, the faithful application of the amortization formula to the M&S property requires an indefinite extension. The City's ingenuity in crafting numerous adjustments to that formula to achieve the result they now desire is without support and is not acceptable.

2. As noted above, and in the Opening Brief of Appellant, the City, without any support whatsoever in the ordinance, took license in applying the clear and simple formula set forth in the ordinance to the M&S Property. The City wholly fails to explain the unsupported, arbitrary and inconsistent adjustments and elaborations it made to the ordinance formula in order to arrive at the predetermined amortization period. The license taken by the City in making those adjustments and elaborations are discussed in detail at pp. 12-15 of Appellant's opening Brief. For example, as the City concedes in its Statement of Facts, the City imported into the ordinance an "adjustment for inflation," use of a three-year period that had already expired, inconsistent use of the terms "net income," "reasonableness," a period of

"major construction," and the terms "fair market value," "average monthly rental income," "net rental income," none of which are defined or even referred to in the ordinance. Additional arbitrary terms and concepts cooked up by the City to achieve its desired result are set out in the opening Brief of Appellant at pp. 17-25. These politically motivated and selective manipulations have no proper place in the application of the clear terms of the ordinance to M&S's property.

RESPONSE TO APPELLEE'S SUMMARY OF THE ARGUMENT

1. Appellants do not claim that the basic terms of a settlement the City was willing to accept (R920-22) were ever reduced to an enforceable agreement. It is apparent, however, that except for the Intervenors' intervention, this case would have been resolved. The City believed it was in the best interests of its citizens that it be settled, that it had "the right to settle" and that "we've got a reasonable settlement" (R 1212 at pp. 39-40). And clearly it was the place and position of the City, rather than the Intervenors, to make that decision for the City. That being so, it was proper for the City to oppose their motion to intervene, as it did. Id.

2. The statement at p. 9 that "the nonconforming use cannot be indefinite," has no support in the ordinance and is contradicted by the City's acceptance of an indefinite period until the Intervenors applied political pressure (R 920-22). Moreover, the ordinance could have included a provision to preclude an indefinite extension but it did not. M&S carefully followed the specific provisions of the ordinance; the City did not.

RESPONSE TO APPELLEE'S ARGUMENT

1. Appellants' response supra to Point I, pp. 10-12, is covered in the response to appellee's summary of argument, at pp. 3-4 supra.

2. Appellants' response to Point II.A. at pp. 13-15 is covered in appellants' combined Memorandum in Support of M&S Cox Investments, LC's Motion for Summary Judgment and in Opposition to Provo City's Motion for Summary Judgment, R 1105 at pp. 1-4 (copy annexed hereto) and is not repeated here.

3. As to Appellants' response to Point II.B. at pp. 15-18, it must be noted again that the only evidence in the record as to any "legislative decision" or interest is the language of the ordinance itself. The claim at p. 16 that the

City could impose "a reasonable amortization period" simply highlights the fact that no such condition is a part of the ordinance and the City's attempt to impose its unilateral view of a reasonable period to satisfy the political demands of the Intervenors was arbitrary and illegal.

The authorities cited at p. 17 of Appellee's brief apply to ordinances whose terms are ambiguous but do not apply where the terms are clear and unambiguous as is the case here.

The City's claim at p. 17 that appellants' position would render the ordinance meaningless or inoperable is without merit. In fact, the ordinance would still apply to give a specified exemption period in all appropriate cases.

As to the term "net income," referred to at p. 18, the fact that the City chooses an interpretation different than M&S does not make that term ambiguous if the City's interpretation is not reasonable. The City's inconsistent application of the term demonstrates that its interpretation is clearly unreasonable.

4. Response to Appellee's Point II.C. The central question here is not, as the City claims, whether the 22 year 3-month amortization period is reasonable; it is whether the

City must follow the terms of its own ordinance. At p. 19 the City states, "though M&S and the Court might reach different conclusions, based on the figures which form the underlying facts . . . their conclusions are immaterial to the issue of whether the City's analysis and conclusions are reasonable." To say the figures are immaterial and don't matter is to admit the City's decision is arbitrary.

The City's claim at p. 20 that "M&S's use of income and actual losses is 'primarily' to support an indefinite period" is misplaced. "Income and actual losses" are used by M&S to follow the terms of the ordinance. The terms "average past rental incomes," "actual rental value," "actual rental income" and "future rental values," used at p. 20, are conjured up and applied by the City without any support whatsoever in the ordinance or otherwise. Apparently, the City believes there is no limit to the terms and concepts it can create or invent and apply to the ordinance, without formal regulation or any other means of assuring consistency. It apparently believes that the meaning and effect of the ordinance are whatever it wants them to be in the circumstances.

As noted above, the investment by M&S and the use of the property for benefit of the Cox family was set and well known to the City long before the ordinance was passed. The fact M&M's that use resulted in a loss had nothing to do with the ordinance. The fact that the City is now under political pressure from the Intervenors should have no place in the City's duty to faithfully and objectively apply the terms of the ordinance as it was once willing to do without now attempting to arbitrarily manipulate the result.

The reference at pp. 23-24 to "reasonable regulations" brings to the fore the City's failure to adopt regulations and the City's inability to provide them when requested by appellants so they could comply with them.

5. Appellants' response to Point III at pp. 23 is covered in Appellants' response to Appellee's Statement of the Case, supra.

6. Appellants' response to appellee's Point IV at pp. 26-28 is covered in the opening Brief of Appellant at pp. 30-36. It was not the right or place of the Intervenors to override the City's efforts to resolve the issues with M&S. That is undeniably what the City administration is empowered

to resolve in the interest of all of its citizens rather than having to cater to the political demands of the Intervenors. The City's change of course after the intervention is unseemly.

Annexed to this Reply Brief of Appellants is the affidavit of Reed L. Martineau confirming the statements referred to at the bottom of p. 23 and top of p. 24 and at p. 29 of Appellants' brief and challenged at p. 20 of Appellee's brief. The fact that the transcript omitted this part of counsel's opening statement was not known to counsel prior to review of the record on appeal. Accordingly, appellant moves the court to include these affidavits as a part of the record on appeal pursuant to Rule 11(h), Utah Rules of Appellate Procedure.

For the City to claim as it does that the as-applied issue had not been raised early and fully both in the lower court and in Appellants' brief here, and to imply that it has been waived by appellant, is beyond surprising. The statement referred to above was made in open court and could not have been misunderstood by either the court or counsel.

CONCLUSION

The City's arbitrary crafting and application of one ingenious term and concept after another to support its unseemly effort to justify its reversal of position and rewrite its simple ordinance to achieve the political result demanded by the Intervenors should not be affirmed. Appellants seek a proper application of the simple, straight forward terms of the ordinance that entitles them to an indefinite amortization period.

DATED this 5th day of March, 2007.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Reed L. Martineau
Attorneys for Plaintiffs/Appellants
M&S Cox Investments, LC, Mervyn Cox
and Sue Cox

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2007, I caused the original and seven copies of the foregoing **REPLY BRIEF OF APPELLANTS** to be sent to the Clerk of the Utah Court of Appeals, and two copies to each of the following:

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by United States Mail, postage prepaid.

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ADDENDUM

1. Record on Appeal, pages 1078 through 1081.

2. Affidavit of Reed L. Martineau.

Tab 1

ARGUMENT

I. STANDARD OF REVIEW

A. Provo City Was Required to Liberally Construe the Ordinance in Favor of M&S.

Utah courts have repeatedly held that zoning ordinances must be strictly construed against the restrictive use of property and liberally construed in favor of an owner's desired use of property. *See, e.g., Carrier v. Salt Lake County,* 2004 UT 98, ¶31, 104 P.3d 1208; *Brown v. Sandy Bd. of Adjustment,* 957 P.2d 207, 210 (Utah Ct. App. 1998). As the Utah Supreme Court stated in *Patterson v. Utah County Bd. of Adjustment*:

> [B]ecause zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.

893 P.2d 602, 606 (Utah 1995).

This expressed preference for the rights of the land-owner gives rise to a less deferential standard when courts review a City's zoning decisions. A Utah court

> will not defer to [a zoning board's] decision where the board failed to base the decision on evidence that could reasonably support the use, or where the decision was made based on an incorrect understanding or application of a statute or ordinance, even if the incorrect understanding or application was reasonable or consistent with prior board application.

Brown v. Sandy City Bd. of Adjustment, 957 P.2d 207, 210 n. 5 (Utah Ct. App. 1998). Because of this policy, "the law in Utah is clear that interpretation of the meaning of zoning ordinances by a board of adjustment is not entitled to deference." *Id.*

Thus, this Court should give no deference to the Board of Adjustment's interpretation of the amortization provisions of the Owner-Occupant Ordinance. This Court must apply a liberal construction of the Ordinance that favors the owner's desired use of the property.

B. Where an Appellant Claims that a Board of Adjustment Decision Violates an Ordinance, a Utah Court Reviews the Decision for Correctness.

Utah law charges this Court with inquiring whether the Board of Adjustment's decision was "arbitrary, capricious, or illegal." *See* Utah Code Ann. § 17-27-a-801(3)(a)(ii). "A determination of illegality requires a determination that the decision . . . violates a law, statute or ordinance in effect at the time the decision was made . . ." *Id.* at (3)(d). Where a Board of Adjustment's decision is claimed to violate an ordinance, the Court reviews the decision "for correctness," applying only a level of "non-binding deference." *See Save Our Canyons v. Board of Adjustment of Salt Lake County*, 2005 UT App 285, ¶ 12, 116 P.3d 978, 983. This low level of deference is applied so as not to concede the Courts' traditional

role of interpreting legislation to non-expert municipal boards comprised primarily of laymen. *See Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3 1208. Because M&S alleges that the Board of Adjustment's decision violates Provo City Ordinance 2000-15, this Court should review the decision for correctness, applying only non-binding deference. *See id.*[3]

II. PROVO CITY'S INCONSISTENT APPLICATION OF ITS OWN FORMULA VIOLATED THE ORDINANCE.

The amortization calculation performed by the City in M&S's case was characterized by ad hoc, politically motivated decision-making. These defects contributed to a decision that violated the Ordinance and exhibited the hallmarks of arbitrary government action. *See, e.g., McGowan v. Mississippi State oil & Gas Bd.*, 604 So.2d 312, 322 (Miss. 1992) (stating that arbitrary and capricious review "condemns ad hoc decision-making"); *Int'l Snowmobile Mfrs. Ass'n. v. Norton*, 304 F. Supp.2d 1278, 1291 (D. Wyo. 2004) (stating that "prejudged political decisions" are arbitrary and capricious).

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[3] Provo City has submitted that the proper standard of review is actually the "arbitrary and capricious" standard. While M&S submits that the Board of Adjustment's decision must be reviewed "for correctness," it also submits that if the Court should adopt the more deferential standard, the Board's decision must still be overturned. As argued below, the decision exhibits classic symptoms of arbitrariness and caprice, and therefore cannot survive under either standard of review.

The City's incorrect and arbitrary calculations and its rationales therefor are rebutted specifically below.

A. The City Achieved Its Desired Result by Using Two Different Figures for the Same "Net Income" Concept.

Provo City argues that "net income from the property" is an ambiguous phrase in need of further clarification from the Court. *See* Provo City Memo. in Support, p. 14. Yet there is no dispute between the parties about the meaning of the term. The dispute about the definition of "net income" is within Provo City itself. The City has taken the same concept and given it two different interpretations and applications. According to the City, in one stage of the formula, "net income from the property" means net rental receipts for four and a half years, between 1996 and mid-2000. *See* March 8, 2004 Janice Larsen Memo, p. 2, section 5. The result is ($27,004.60), a negative number. In a different part of the formula, "net income from the property" means only net rental receipts for 1999, the first six months of 2000, and hypothetical projected future rental receipts for the remaining six months of 2000. *See* March 8, 2004 Janice Larsen Memo, p. 2, section 6. The result is $31,742.06, a number almost $60,000 greater than the first.

By employing its "net income-plus" figure in the calculation of M&S's average monthly rental income, the City assured that M&S's

Tab 2

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IN THE APPELLATE COURT OF THE STATE OF UTAH

M&S INVESTMENTS, L.C., a Utah Limited Liability Company, MERVYN COX and SUSAN COX,	**AFFIDAVIT OF REED L. MARTINEAU**
Plaintiffs/Appellants,	Case No. 000403654 Case No. 040402050
vs.	
PROVO CITY CORPORATION,	Argument Priority Classification No. ___
Defendant/Appellee.	

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

1. I am an attorney licensed to practice in the State of Utah and before this Court.

2. On January 27, 2006, I represented the plaintiffs-appellants in a hearing before the Honorable Steven L. Hansen on reciprocal motions for summary judgment of plaintiffs-appellants and defendant-appellee Provo City Corporation.

3. When directed by the Court to present the argument for plaintiff-appellants, I began by first stating clearly to the Court that two main issues remained in the lawsuit, i.e. the "as-

applied" issues and the "Amortization" issues and advised the Court that only the Amortization issues, and not the applied issues, were before the Court for argument.

3. I purposely made this statement at the beginning of my argument to emphasize M&S's position that the as-applied issues had not been raised by motion, argued or ruled on.

4. Opposing counsel made no reply or objection to that statement.

5. As noted in footnote 5 on page 24 of the Brief of Appellee, the transcript of that hearing notes that "the beginning not recorded" for reasons I do not know.

6. I request that, pursuant to Rule 11(h) Utah Rules of Appellate Procedure, this Affidavit be made a part of the record.

7. I am surprised that the City has challenged the statement made in the Brief of Appellant and intimates that such a statement was not made.

DATED this 2nd day of March, 2007.

Reed L. Martineau

SUBSCRIBED AND SWORN to before me this 2nd day of March, 2007.

Notary Public
Residing at: Davis County, Utah

My Commission Expires:
5/12/2007